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MONTANA PROSECUTOR

October, 1977 Volume 1, No. 6

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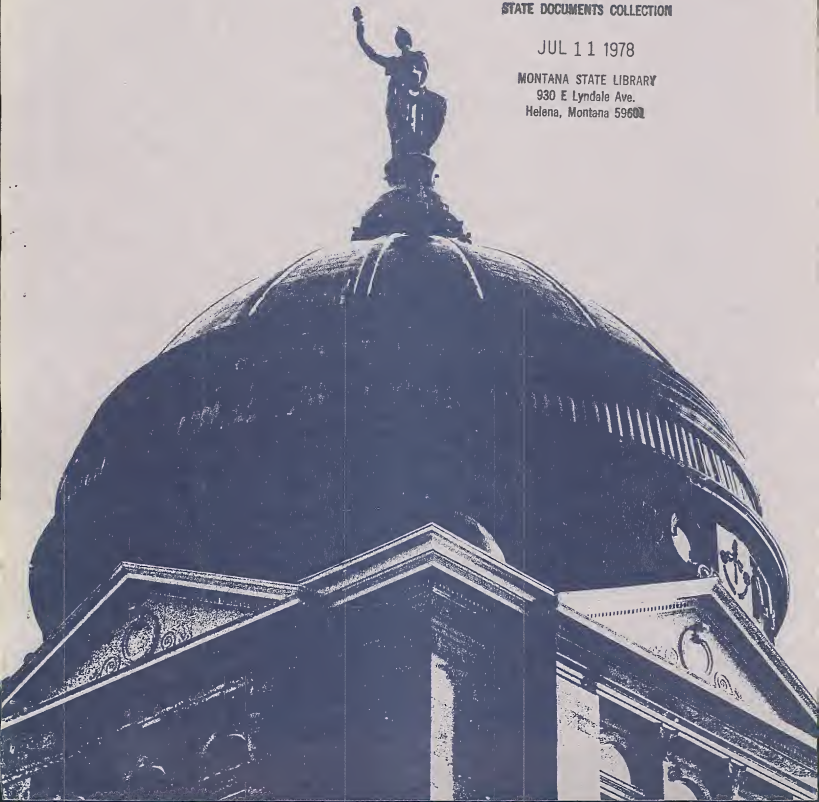

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INTRODUCTORY NOTES

Included within this issue of The Montana Prosecutor are references to recent cases and notes of interest, practice aids including a sample investigative subpoena, a list of objections, sample questions to ask a fingerprint expert, a proposed method of examining a witness to a confession or admission, a list of terms frequently used by prosecutors and notes on conspiracy, entrapment and use of habitual offender statutes. Also included is a list of expert witnesses available to Montana prosecutors. It includes not only resident experts but those with which our crime lab has cooperative agreements. Arnold Melnikoff has indicated that whenever a prosecutor is in need of an expert, he or she should call the lab (728-4970) if assistance in procurement of an expert is desired.

The sample investigative subpoena was submitted by Tom Beers of the Western Montana Special Prosecution Unit and Missoula County Attorney's Office. A sample affidavit setting forth the justification for issuance of the subpeona is not included.

The grant application for out-of-state prosecutor training has been approved by the Montana Board of Crime Control. The grant calls for a ten percent "match", five percent of which will be borne by the Department of Justice with the other five percent being assumed by the applicant's county. A schedule of the training seminars available was published in the September issue of the Montana Prosecutor. No changes or additions to that schedule have been noted. Those interested in applying for out-of-state training should submit a written request to the County Prosecutor Services Bureau. The request will be reviewed and if approved will cover the costs of airfare, mileage, per diem, registration, tuition, books and training supplies. If approved the applicant will be given written notification along with a voucher and a copy of the state regulation pertaining to allowable travel expenses. At the conclusion of the trip, the applicant/attendee must then submit receipts for the items listed above as being a reimburseable expense along with the voucher and reimbursement will then be made. The county of which the applicant/attendee is a representative will then be "charged back" five percent of the total expenses by the Department of Justice. The five percent charge-back is considered part of the "match" funds to obtain the grant.

QUOTES OF THE MONTH

"Justice will be achieved only when those who are not injured feel as indignant as those who are." Solon 638-558 B.C.

"And what makes robbers bold but too much lenity." Shakespeare

"One is not entitled to counsel while he is committing his crime." Garcia v. United States, 364 F.2d 306

RECENT CASES

SEARCH AND SEIZURE - INVENTORY AND IMPOUNDMENT OF VEHICLES - ALTERNATIVES

Two policemen who arrested a DWI defendant after his vehicle collided with a police car were not required to suggest alternatives before impounding his car and inventorying its contents, the Florida Court of Appeal, Second District, says. "While there are opinions which have held that reasonable requests as to the disposition of an arrestee's vehicle be complied with, case law has not gone so far as to require that a silent arrestee be consulted as to his wishes concerning the care of his property or be advised of other means of providing for removal. From a thorough analysis of the relevant case law in Florida, Judge Scheb, in recent opinion from this court, discerned that the essence of a lawful impoundment of a vehicle is necessity. Altman v. State, 335 So. 2d 626, 19 CrL 2446 (Fla. 2d DCA 1976).

We believe that the circumstances attendant to the arrest in the case before us do not demonstrate any reasonable alternative to impoundment and that it was clearly necessary and lawful to impound appellee's vehicle. At the time of the arrest for DWI appellee was intoxicated which would have diminished his ability to form and articulate any preference he might have had as to the disposition of his property. The automobile was stopped in the 'middle lane of the traffic driveway' in 'a business area where it impeded traffic and commerce. . ..' which necessitated removal. The scope of the search of appellee's automobile was well within the boundaries of a valid inventory search." (State v. Dearden; Fla CtApp, 2d Dist, 6/29/77).

ARGUMENT

Argument that a not guilty verdict would encourage other dope dealers to arm themselves and shoot undercover narcs, then claim they did not know the victims were officers, was based upon the facts, but was an "improper appeal to the jury's fears". (Good dissent on this point.) State v. Mincy (Ariz.) 566 P.2d 273.

ENTRAPMENT - PRIOR BAD ACTS

Not an abuse of discretion to admit evidence of the sale of heroin 4-7 years prior to trial where the defense of entrapment is raised. State v. Korte 566 P.2d 318.

MIRANDA - IMPEACHMENT

Proper to admit defendant's statements taken after he asked for a lawyer for impeachment purposes only, where a nurse of the intensive care ward testified the statements were voluntary. The failure to make specific findings of voluntariness was held harmless error where the prosecutor told the court at the suppression hearing the statements were voluntary and admissible for impeachment purposes only, and the court let the statements be used for impeachment only. State v. Mincy (Ariz.) 566 P.2d 273

SEARCH AND SEIZURE

A brooch found by an officer on defendant's driveway, where he does not have a reasonable expectation of privacy against non-intrusive viewing, through the use of a flashlight was properly admitted. The officer had defendant's consent to his presence on the driveway and the brooch was in plain view, since the brooch would have been visible in a few hours anyway. State v. Cobb (Ariz.) 566 P.2d 285.

THREATS

Defendant's statement about buying a gun in case the pigs hasseled him two and one half months before shooting narc was admissible since the shooting could reasonably be inferred to be related to the statement, the threat was against police, and the length of time went to the weight of the evidence only. State v. Mincy (Ariz.) 566 P.2d 273

ACCOMPLICES

Defendant, who by his own statement was present when the plan to rob decedent was made, accompanied the killers and passively watched the killing, coupled with a witness who saw him receiving money from the killers, was properly convicted of aiding and abetting the killing. Further, his statement without an attorney was voluntary even though he at first requested an attorney, since his request cut off questioning and he subsequently volunteered the statement without the attorney. People v. Morgan (Ill.) 364 N.E.2d 56.

ARREST

No rule demands that a suspect be given a sporting chance to get to destructible evidence or a weapon before an arresting officer is able to find them, therefore police may first see to the safe custody and the security of the suspects and then make a limited search. Where search was confined to a small motel room where the arrest occurred, and it took place within a minute or two after arrest, it was reasonable and proper. State v. Shane (Iowa) 255 N.W.2d 324

MIRANDA

An accused's consultation with counsel prior to interrogation does not obviate the requirement that officers fully advise the accused of his constitutional rights particularly where his counsel told the officers his client wished to remain silent. The fact that an accused conferred with his counsel, standing alone, does not establish that the accused was fully aware of the nature and extent of his constitutional rights. State v. Fossen (Minn.) 255 N.W.2d 357.

PRIVILEGE

A wife was properly permitted to testify against her husband in his trial for the murder of the wife's paramour. The husband-wife privilege may not be claimed when one spouse has committed a crime against the other, and the court concluded that the murder was part of the same transaction as the defendant's assault upon his wife. State v. Thompson, 21 Cr. L. 2242 (5-12-77), Washington

ALCOHOLISM

The economic costs of alcohol misuse and alcoholism are estimated at $25 billion annually in lost production, illness, traffic accidents, and social welfare costs, according to a study for the National Institute on Alcohol Abuse and Alcoholism (NIAAA).

DRUG LAW FOUND INEFFECTIVE

A federally funded $1 million study by the Committee on Drug Law Evaluation has found that New York's tough 1973 drug law did not reduce drug use or drug-related crime. The law, said to be the toughest in the nation, had stiff mandatory sentencing provisions. The committee said the law itself is important but that the condition of the criminal justice system is even more of a factor in determining whether the law is effectively implemented.

POT PENALTY REDUCED IN NEW YORK

New York has become the ninth state to remove criminal penalties for possession of small amounts of marijuana. The New York law makes possession of up to 25 grams of marijuana a violation, in the same category as a traffic offense, with a fine of up to $100 for a first offense. New York is the only state of the nine to limit noncriminal possession to less than one ounce.

Other states which have decriminalized marijuana are Alaska, California, Colorado, Maine, Minnesota, Mississippi, Ohio and Oregon. A state study of California's liberalized marijuana law (SB 95) which went into effect July 1976 showed a decline in marijuana arrests, a reduction in associated criminal justice costs, and an increase in juvenile trafficking arrests.

The number of adult Californians who use marijuana rose from 9 to 14 percent according to Field Research surveys conducted for the state study. The survey also showed that 66 percent of the 18 to 29 year olds have tried marijuana and that 31 percent of this age group use it. State Attorney General Evelle J. Younger said that if these trends continue consideration should be given to tighter controls.

MAGAZINE ARTICLE HIGHLIGHTS SHIFT IN TREATMENT OF HARD-CORE CRIMINALS

"The prime purpose of prisons must be not to correct those within but to protect those without." This is the conclusion of Eugene H. Methvin in a hard-hitting article appearing in the June, 1977 issue of The Reader's Digest. Titled "Crime in America - A Turnaround at Last?", the article cites studies and statistics which support the philosophy of reducing crime in the streets by putting hard-core criminals in prison and keeping them there with tougher sentences.

Terming last year's downtrend in major crimes not only "exciting news" but "a compelling support for a gathering revolution in attitudes toward crime and punishment", Methvin states:

"After a steady six-year decline of 11.4 percent, U.S. prison population hit bottom in 1967 at 195,000 and stayed there through 1972. Meanwhile, violent crime outside soared 189 percent over 1961."

HARD-CORE CRIMINALS (cont.)

"But during the last four years, prison population has grown 39 percent to a record high of 283,000. The 1976 jump of 33,000 was the largest single-year increase on record. And as if someone had thrown a giant switch, police departments across the land registered the first drop in violent crime since 1955."

"In other compelling evidence which Methvin presents is the "Dirty Six" study by University of Pennsylvania criminologist Marvin Wolfgang. In 1964, Wolfgang researched records of nearly 10,000 young men enrolled in Philadelphia schools, all of whom were born in 1945. Six percent of them (627) were chronic offenders with five or more arrests by age 18. Wolfgang followed these "six percenters" through their 30th year in 1975. By then, an estimated 1440, or nearly 15 percent, had collected five or more arrests and together had committed an estimated 22,000 crimes. Wolfgang found that once a juvenile has been arrested three times, his chances of committing a fourth offense are more than 70 percent. After that, there is an 80 percent chance he will commit a fifth and keep it up to his 20th. Wolfgang calculated that if the Philadelphia courts had sent each chronic offender to prison for just a year after his third offense, there would have been 7200 fewer serious crimes."

Methvin reviews ongoing programs to remove career criminals from the street through tougher sentencing, and application of habitual offender laws.

The article gives to the public much-needed information to enlist its support for prevention-through-punishment. And it is highly recommended reading for all those in law enforcement who need facts and figures to bolster their conviction that rehabilitation has not been the total answer to crime reduction.

"INVESTIGATIVE STOPS"

In two brief per curiam opinions decided without oral argument, the Minnesota Supreme Court illuminates the razor-thin line between a permissible "investigative stop" of a vehicle and an illegal one.

In the first case, a majority of the court holds that an officer's unarticulated suspicion, ignited by a motorist's nervous response to his presence, was inadequate cause for a stop and traffic check. Justic Yetka dissents; he believes that penalizing officers for acting on instinct or "gut feelings" will either discourage effective police action or encourage police perjury. (State v. Johnson, 7/22/77, 21 CrL 2461).

CLAIM OF FORCIBLE, WARRANTLESS PUBIC HAIR-PULLING

A rape suspect who claimed that a police officer ran afoul of the Fourth Amendment by forcibly pulling strands of pubic hairs from his body without a warrant has a cause of action under 42 USC 1983, a majority of the U.S. Court of Appeals for the Ninth Circuit holds. If the plaintiff's assertions are true, the majority says, he was subjected to a "painful and humiliating invasion upon the most intimate parts of his anatomy." Such a search would take a warrant to satisfy the Fourth Amendment's reasonableness requirement, the court says.

The alleged search fell within no exception to the warrant requirement, the majority says. There was no danger that the evidence would be destroyed before a warrant could be obtained. However, the court voices no view as to the merits of any defenses, such as immunity of government officers, that might be raised. (Blouse v. Bussey, 21 CrL 2453).

CREDIT CARDS - VALUE

Where there is no legal market, evidence of illegal market value may be used to establish value. Thus, evidence of "street" or "thief's market" value of stolen credit cards, of the reward offered for return of stolen cards, and the amount that could be purchased with the stolen credit card, was properly admitted to prove the value of the cards in an attempted grand theft case. Miller v. People (Colo.) 566 P.2d 1059.

DEFENSES - IMPOSSIBILITY

Defendant who wanted to purchase a controlled substance from narcs, then paid $20,000 for what he thought was a quantity of the controlled substance, but was actually a non-controlled substance, was properly convicted of knowingly attempting to distribute a controlled substance. United State v. Korn (5th Cir.) 557 F.2d 1089.

REPARATION

Reparation as a term of probation is approved. The amount of reparation should be within the means of defendant, is not confined to liquidated, special or easily measured damages, and may exceed the amount of fine permissible. State v. Garner (App. Div. 1) 566 P.2d 1055.

INSTRUCTIONS - ENTRAPMENT

There was no evidence of entrapment where the informant merely asked the defendant, who had already sold him one blank check, to supply him with other blank checks, any persuasion was merely incident to such a sale, and the evidence of the previous sale showed familiarity with the business. Since there was no evidence of entrapment, defendant's request for an entrapment instruction was properly denied. People v. Bowie (Cal. App.) 140 Cal. Rptr. 49.

PHOTOS

Photos showing wound location and character of wound on decedant are always admissible even though cumulative and offered on a non-contested issue. Turk v. State (Ala.Cr.App.) 347 So.2d 588.

PRESENCE OF DEFENDANT

Trial court was not bound to consider only defendant's testimony and take his word as to why he was not present, and, after a hearing, could start the trial without him despite claims of heart trouble. Other defendant's interests, court time, and the state's interests could be considered in making the decision. Reviewing court looked at whole record and agreed with trial court that the defendant was malingering. United States v. Pastor (2nd Cir.) 557 F.2d 930.

PRIOR BAD ACTS

Sexual molestation of two other minor members of defendant's household was admissible on two grounds. First, the testimony showed a continuing plan to use minor female household members for sexual gratification, at home or the office, and second the evidence was admissible as similar acts which supported the testimony of the minor prosecutrix, whose credibility had been attacked. Even if inadmissible, the testimony was harmless. People v. Fritts (Cal.App.) 140 Cal.Rptr. 94.

PROOF - THEFT

There was no fatal variance between indictment charging the defendant with taking money in the amount of $5000 and the proof of the defendant taking a check for the amount of $5000. Conviction for larceny upheld. Hagy v. State (Fla.App.) 347 So.2d 773.

RECEIVING STOLEN PROPERTY

Evidence that inferred that stolen property was used on defendant's property for his benefit, that there had been an attempt to conceal the property by repainting and changing identifying serial numbers, and defendant's admission that he knew the property was on his land for almost six months before it was dicovered there by police was sufficient to sustain defendant's conviction of concealing property knowing that it was stolen, and there was no need to show from whom the property was received. Hardeman v. State (Tex.Cr.App.) 552 S.W.2d 433.

SEARCH AND SEIZURE

Where the citation and impounding of defendant's auto for blocking a driveway were undertaken for the purpose of searching the auto, and inventorying of impounded cars was not a routine practice of the police department, a warrantless inventory search of the auto was unreasonable. United States v. Hellman (9th Cir.) 556 F.2d 442

Court has repeatedly held that the Fourth Amendment protects a citizen's privacy only against an initial intrusion. Once the expectation of privacy has been legally invaded by one officer, other officers may enter to the entent of the initial intrusion, even though the exigent circumstances justifying the initial entry no longer exist. Thus, marijuana cigarette butts, hypodermic needles and pills seen by officers in living room where overdose occurred coupled with a tip constituted probable cause. United State v. Brand (5th Cir.) 556 F.2d 1242.

SEARCH AND SEIZURE

A misrepresentation in an affidavit for a search warrant, even if material to probable cause, will not call for suppression of the evidence if the mistake is innocent. Smith V. State (Ala. 1977).

EVIDENCE - PROBABLE CAUSE - JUVENILES

The uncontroverted testimony of an accomplice is allowed in a probable cause hearing to transfer someone from the juvenile division to the adult criminal division. Vincent v. State (South Carolina 1977).

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

Investigative File No._____

INVESTIGATIVE SUBPOENA DUCES TECUM

THE PEOPLE OF THE STATE OF MONTANA SEND GREETINGS TO:

_____

_____

WE COMMAND YOU, that all and singular business and excuses being laid aside, you appear before the Missoula County Attorney, Missoula County, State of Montana, at the Court House in the County of Missoula, on the_____day of_____, 19___, at_____o'clock ___M., then and there to testify in the above-numbered investigation and you are further commanded to bring with you, and then and there produce in evidence*

_____

_____

_____

_____

FURTHERMORE, the secrecy and disclosure provisions relating to grand jury proceedings are applicable, and any disobedience of the requirements of this subpoena will be punished as a contempt by the said court.

*Describe the books or papers to be produced

The Honorable_____, Judge of the Fourth Judicial District, at the Court House, in the County of Missoula, having found that the administration of justice requires the issuance of this subpeona hereby authorizes the Clerk of Court to issue investigative subpeona duces tecum.

Dated this_____day of_____, 19____.

JUDGE_____

ATTEST: My hand and the seal of said Court the day and year last above written.

_____, 19____.

LEA D. LaFRINIERE, Clerk

By_____
Deputy Clerk

STATE OF_____
ss
COUNTY OF_____ RETURN

_____of said County, being duly sworn says that he served the within Investigative Subpoena Duces Tecum by showing the within original to each of the following persons named therein, and delivering a true copy thereof of the said persons, personally, on the_____day of_____, A.D., 19____, at the said County of_____.

_____

LIST OF OBJECTIONS

1. Incompetent
2. Irrelevant
3. Immaterial
4. Hearsay
5. Leading and Suggestive
6. Not responsive; gratuitous comment
7. Calling for a conclusion
8. Asked and answered
9. Assuming facts not in evidence
10. Argumentative
11. Beyond the Scope
12. Compound
13. Unintelligible
14. Not the best evidence
15. Opinion by non-expert
16. No proper foundation
17. No corpus delicti, lack of corroboration
18. Privileged communication
19. Improper impeachment of own witness
20. Cumulative
21. Self-serving
22. Improper Argument of counsel
23. Improper because highly prejudicial
24. Accusatory question

FINGERPRINT EXPERT

The following is a list of questions by Phil Conover of the Montana Identification Bureau to be used when examining a fingerprint expert. The questions parallel exactly those that the FBI experts request to be asked.

1. What is your name?
2. By whom are you employed and in what capacity?
3. What are your duties?
4. By whom were you employed prior to your employment with the State of Montana?
5. What were your duties with the FBI?
6. What is an inked fingerprint?
7. What is a latent fingerprint?
8. How are fingerprints compared?
9. What is your understanding of the use of fingerprints as a means of identification?
10. Have you ever testified to a fingerprint identification? Where?
11. Have you ever seen this evidence (State's exhibit____)?
12. Did you examine it?
13. What were the results of your examination?
14. Have you ever seen this fingerprint card (State's exhibit___)?
15. Did you compare the latent fingerprints on State's Exhibit___ with the fingerprints on State's exhibit___?
16. Do you have an opinion as a result of these comparisons?
17. Do you have photographs of the latent prints?
18. Did you make charted enlargements for demonstration purposes?
19. Will you explain your charts to the jury?

ADMITTING A CONFESSION INTO EVIDENCE

A.) Qualify the witness as an experienced criminal investigator

1.) State your name.

2.) Do you know the accused in this case? Please identify him.

3.) What are your official duties? How long have you been engaged in Criminal Investigation work?

4.) What specialized training have you received in Criminal Investigation work?

5.) How do you usually begin the interrogation of a criminal suspect?

6.) Do you ever vary from this practice?

B.) Establish that the accused was advised of his rights

1.) When did you first have contact with this case?

2.) What were you told about the types of suspected offenses?

3.) What, if anything, were you told about suspects?

4.) Did you interview any suspects?

5.) Whom did you interview first?

6.) Did you interview the accused? Where did this interview take place? When?

7.) What time did this interview begin? Terminate?

8.) Who was present at this interview?

9.) Tell the court exactly how you began this interview.

10.) Using the exact language you used then, tell the court how you advised the accused of his rights. (Counsel should check this list off as the witness testifies.)

_____Advised him of the offense(s) he was suspected of committing.

_____Advised him that he had a right to remain silent.

_____Advised him that any statment he might make could be used against him in a criminal trial.

_____Advised him that he had the right to consult with counsel and have counsel present during questioning.

_____Advised him that he might retain counsel at his own expense or at his request that counsel would be appointed at no expense to him.

_____Advised him that "counsel" meant "lawyer."

_____Advised him that he could terminate the interview at any time and he could stop answering questions at any time.

_____Advised him that he could request counsel at any time during the interview.

_____Advised him that at any time he requested counsel the interview would terminate.

11.) What was the accused's demeanor at this time?

12.) Did he appear to understand what you had told him? How do you know that?

13.) What was his response to your warning?

C.) Establish that the accused waived his rights voluntarily

1.) At this time did you say anything else to the accused?

2.) Were any threats of punishment made to obtain this waiver from the accused?

3.) Were any promises of reward or benefit made to obtain this waiver?

4.) Was any physical force or coercion applied to the accused to obtain this waiver?

5.) Did the accused waive his rights voluntarily and of his own free will?

6.) After waiving his rights, did the accused later invoke any of his rights?

7.) Did he later ask for the assistance or presence of counsel?

8.) Did he at any time ask that the interview or the questioning stop?

9.) After the accused waived his rights, what did you do?

(NOTE: If the waiver was put into writing at this point present the statement to the witness, have him identify it, and ask how he is able to identify the waiver part.)

D.) Establish that the statement was given voluntarily

1.) In a very general manner, tell the court how the accused responded to your questions?

2.) What was the subject of the accused's statement?

3.) At what time during the interview did he make this statement?

4.) What was the demeanor of the accused at this time?

5.) Were threats made to obtain this statement from the accused?

6.) Were promises of reward or benefit made to induce the accused to make a statement?

7.) Was physical force used to coerce the accused to make a statement?

8.) Did the accused make this statement voluntarily and of his own free will?

9.) What did you do after the accused gave this oral statement?

10.) How was this statement reduced to writing?

11.) Was this written statement a verbatim transcription of his oral statement?

12.) What did you do after typing this statement?

13.) What did the accused do with the written statement? (corrections initialed by accused) NOTE: Mark written statement as exhibit next in order and proceed.

14.) I hand State's Exhibit_____for identification and ask if you can identify it.

15.) How are you able to identify it?

(NOTE: At this point, offer the defense an opportunity to cross-examine on these issues. After they have finished, obtain a ruling from the judge on <u>each</u> of the following matters:

1. The warning was legally sufficient.
2. The waiver was given voluntarily.
3. The statement was given voluntarily.

Do not excuse the witness yet. If favorable rulings have been given on each of the above three points, ask for leave to read the written statement aloud to the court or jury. Then ask the following questions.)

16.) What difference, if any, are there between the oral statement and this written statement?

17.) Why were these matters left out of the written statement?

18.) Are there any matters given in the written statement that were not given in the oral statement?

Oftentimes a search for the right word to use in presentation of matters to a court or jury is not possible because of time constrictions. Below is a list which may aid those who get in court and have a need to use a synonym or antonym.

INFERENCE OF NON-COMMISSION	INFERENCE OF COMMISSION
Nonconsensual Sex Crimes	
Chaste	Carnal
Virtuous	Sensual
Virginal	Lewd
Celibate	Lustful
Pure	Prurient
Undefiled	Lecherous
Peaceful	Wanton
	Bestial
	Violent
Thefts	
Honest	Lying
Scrupulous	Deceitful
Trustworthy	Furtive
Honorable	Thieving
Charitable	Larcenous
Unselfish	Light-fingered
Guileless	
Generous	
Benevolent	
False Statements and Perjury	
Honest	Deceptive
Dependable	Deceiving
Candid	Elusive
Sincere	Tricky
Frank	Conniving
Open	Crafty
Guileless	Perfidious
Crimes of Violence	
Passive	Aggressive
Timid	Audacious
Weak	Militant
Reflective	Dominating
Cautious	Domineering
Peaceful	Venturesome
Meek	Impulsive
Unresisting	Assertive
Resigned	Rash
Patient	Violent
Mild	Insolent
Humble	Irreverent
	Rude
	Derisive

NOTES ON CONSPIRACY

---Developments in the Law, Criminal Conspiracy, 72 Harvard Law Review 920 (1959) - Excellent resource

---The gist of the crime is the agreement itself rather than the action pursuant to it. 72 Harvard L.R. 920

---In its deterrent function the law operates on the mechanism of choice seeking to make the disadvantages of criminal activity appear to outweigh the advantages. 72 Harvard L.R. 920

---So long as an unlawful design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself - the mind proceeds from a secret intention to the overt act of mutual consultation and agreement. 72 Harvard L.R. 920

---Conspiracies are punishable on the theory that increased danger is involved in a group offense - Perkins Crim. Law

---Conspiracy conviction can rest upon proof of an overt act not charged in the indictment. Brulay v. United States, 383 F.2d 345 (1967)

---Conspiracy requires on the part of each conspirator communion with a mind and will outside himself. 72 Harvard L.R. 920

---Conspiracy proved where defendant was providing security away from the transaction with a weapon - People v. Vandiver, 522 P2d 6

American Tobacco Co. v. United States, 328 U.S. 781 (1946)

---It is not important whether the means used to accomplish the conspiracy are in themselves lawful or unlawful.

---No formal agreement is necessary to constitute an unlawful conpiracy.

---The criminal act is not the communication of the agreement, but the act of agreement itself, that is, the continuous and conscious union of wills upon a common undertaking.

---The following cases provide good references when prosecuting a conspiracy case:

1. U.S. v. Agueci , 310 F2d 817 (2d Cir 1962), cert. denied 372 U.S. 959 (1963)

2. U.S. v. Borelli, 336 F2d 376 (2d Cir 1964), cert denied, 379 U.S. 960 (1965)

3. U.S. v. Varelli , 407 F2d 735 (7th Cir. 1969)

4. U.S. v. Geaney, 417 F2d 1116 (2d Cir. 1969), cert denied, 397 U.S. 1028 (1970)
5. U.S. v. Roselli, 432 F2d 879 (9th Cir, 1970), cert denied, 401 U.S. 924 (1971)
6. U.S. v. DeSapio , 435 F2d 272 (2d Cir 1970) cert denied, 402 U.S. 999 (1971)
7. Schaffer v. U.S., 362 U.S. 511 (1970)
8. Anderson v. U.S., 417 U.S. 211 (1974)

NOTES ON ENTRAPMENT

---The defendant raises the defense at his own risk. At the trial the accused may examine the conduct of the government agent, but the accused will be subjected to an appropriate and searching inquiry into his own conduct and predisposition as bearing on his claim of innocence. 62 ALR 3d 110

---State v. Parr 283 P2d 1086 129 Mt. 175 Most courts have taken the position that the defense of entrapment is not available to a defendant who denies that he committed the offense charged (61 ALR 2d 677)

----To rebut entrapment prosecution may wish to introduce evidence of other unlawful acts regarding narcotics even though defendant has neither been arrested nor convicted for these acts - General Rule: Evidence of a defendant's other acts similar to the offense charged is ordinarily admissible to rebut the defense (61 ALR 3d 293)

---Establishing entrapment upon direct examination of defendant Bailey & Rothblatt - Handling Narcotics Cases - section 263, 264

The fact that a police officer hides his identity and solicits the purchase of illegal goods does not constitute entrapment. (People v. Bucher, 511 P.2d 895 (Colo. 1973)

---The court can find entrapment as a matter of law (because it's usually a factual question for the jury) only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action which he was not predisposed to take - State v. Campbell 110 NH 238, 265A 2d 11 (1970) p.135

---State v. Waggoner 490 P2d 1308 (Wash 1971) The offer to sell was made by defendant on his own initiative during a telephone call which he made to the informant two days after the informant had last expressed to him an interest in buying drugs.

References:

62 ALR 3d 110
U.S. v. Russell 411 US 423 (1973) 36 LEd 2366, 96 S.Ct 1637
State v. Harvey 499 P2d 802 (1972 Mt)
State v. Karathanes 493 P2d 326 (1972 Mt.) 158 Mt 461
People v. Moran 463 P2d 763 (1970 Cal)
People v. Bucher 511 P2d 895 (1973 Colo)

JUDICIAL DESIGNATION OF PERSISTENT FELONY OFFENDER FOR PURPOSES OF PAROLE ELIGIBILITY AND SENTENCE OF IMPRISONMENT FOR PERSISTENT FELONY OFFENDER

I. JUDICIAL DESIGNATION OF PERSISTENT FELONY OFFENDER FOR PURPOSES OF PAROLE ELIGIBILITY

Under section 95-3214 (c) an accused designated a persistent felony offender under section 95-2206.5 R.C.M., 1947, may be paroled after he has served one-third (1/3 rd) of his full term less good time allowances as provided in section 80-1905 R.C.M. 1947, or seventeen and one half (17 1/2) years.

Designation of a persistent felony offender under section 95-2206.5 requires that:

1. The previous conviction of the accused be for a felony;

2. Less than five years have elapsed between the commission of the present offense and either the previous felony conviction or the accused's release on parole or otherwise from prison or other committment; and

3. The accused was 18 years or older when he or she committed the present offense.

It appears from reading the statute, section 95-2206.5, that when the offender has been previously convicted of a felony, judicial designation of persistent felony offender is mandatory. The statute reads, "the sentencing court shall designate the offender a persistent felony offender for purposes of eligibility for parole . . .." No notice need be served or filed when judicial designation of a persistent felony offender for purposes of eligibility of parole is sought, nor must a hearing be had.

II. SENTENCE OF IMPRISONMENT FOR PERSISTENT FELONY OFFENDER

Under sections 95-1506, 1507, and 2206.5 R.C.M., 1947, an accused can not only be designated a persistent felony offender for purposes of parole eligibility under section 95-3214 R.C.M., 1947, but can also be liable for imprisonment for a term of not less than five years nor more than one hundred years. A sentence of imprisonment for a persistent felony offender under section 95-1507 R.C.M.. 1947 requires that:

1. The previous conviction was for a felony;

2. Less than five years have elapsed since the commission of the present offense and either the previous felony conviction, or the accused's release on parole or otherwise from a prison or other committment; and

3. The accused was more than 21 years old at the time of the commission of the new offense.

By satisfying the requirements of section 95-1507 R.C.M., 1947, the requirements of section 95-2206.5R.C.M., 1947, are automatically fulfilled. Be sure however, to request of the judge on the record not only additional imprisonment of the accused, but also judicial designation of the accused as a persistent felony offender. Also be sure that the judgment reflects the fact that the accused has been so designated. The judgment is one of the main reference sources used by the parole and prison people to calculate parole eligibility so it is extremely important that it reflect the designation of the accused as a persistent felony offender if you want him or her to serve one-third of his or her sentence rather than one-fifth.

Section 95-1506 R.C.M., 1947 requires that for increased punishment to be imposed notice must be served before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty.

The notice must specify the prior conviction, it must not be made public nor in any manner be made known to the jury before their verdict is returned. If the accused is convicted, the notice, along with proof of service shall be filed with the court before the time fixed for sentencing. The court must then set a date for hearing with at least three days notice to the accused. The Court shall then, in camera, hold the hearing and if the allegations of prior conviction are true the accused shall be liable for increased punishment for a term of not less than five nor more than one hundred years.

EXPERT WITNESSES - for Montana, known to Criminal Investigation Lab September 1977 (to be updated)

Please, arrange for analysis with us, except where designated, so as not to overload the experts.

(*) May contact directly.

Charges (1) Analyses, travel & testimony, free.

(2) Analyses free, travel expenses & expert witness fees, if any, charged to submitting agency - most state employees do not charge witness fees.

(3) Private examiner - fees for analyses & testimony, as well as travel expense charged to submitting agency.

GENERAL LAB SERVICES:

CIL *(1) Criminal Investigation Lab 243-5796
Suite 115 - Wilma Building 728-4970
Missoula, Montana 59801

FBI *(1) Clarence Kelly, Director (202) 324-3000
FBI Laboratory
J. Edgar Hoover Building
Washington, D.C. 20535

ATF *(1) Chief, Forensic Lab (202) 964-6277
Bureau of Alcohol, Tobacco & Firearms
P. O. Box 7615 - Ben Franklin Station
Washington, D. C. 20044

OR

Chief, San Francisco Regional Lab (415)556-7040
U. S. Naval Station - Treasure Island
Building 233
San Francisco, California 94130

GENERAL INVESTIGATION SERVICES:

*(1) Criminal Investigation Bureau 449-2769
1437 Helena Avenue
Helena, Montana 59601

ACCIDENT INVESTIGATION - Local Officers, S.O., P.D., or M.H.P.

Special Investigation Problems: M.H.P. Recommends:

*(1)	Captain Melvin Mooney, Butte	494-3277
*(1)	Sgt. John Cahl, Glendive	365-5238
*(1)	Sgt. Mike Wood, Havre	265-2512
*(1)	Lt. Don Eshleman, Great Falls	453-1121
*(3)	"THE EXPERTS" The Traffic Institute Northwestern University Evanston, Illinois 62334	(312) 492-5476
CIL *(1)	Ken Konzak - head & tail light examination	243-5796 728-4970

ARSON INVESTIGATION - Investigation Problems

*(1)	State Fire Marshal Bureau 1409 Helena Avenue Helena, Montana 59601	449-2050

(See ATF & CIL, Arnold Melnikoff, Jim Hutchison Larry Pederson)

BEVERAGE ANALYSIS

*(1) (see ATF)
*(1) (see CIL - Larry Pederson)

BOTANY - (see also environment) University of Montana Botany Department Herbarium (flowering plants)

(2)	Dr. LeRoy Harvey	243-2192
(2)	Dr. Thomas J. Watson, Jr.	243-4743
(2)	Mr. Klaus Lackschewitz	243-2192

U of M. Botany Department (fungi Identification)

(2)	Dr. Melvin L. Thornton	243-2371

U of MPharmacy Department (medicinal plants)

(2)	Dr. Rustem S. Medora	243-4343

DOCUMENT EXAMINERS - (see FBI & ATF)

*(3)	Jan Beck 308 Central Building 810 3rd Avenue Seattle, Washington 98104	(206) 623-4141

*(3) Ben Garcia (303) 222-2360
711 Symes Building
Denver, Colorado 80202 (civil cases only)

*(3) Bob Phillips (206) 426-4791
Hartstene Pt - Hartstens Island
Shelton, Washington 98584

DRUG ANALYSES:

CIL *(1) Arnold Melnikoff, Ken Konzak, Jim Hutchison, Larry Pederson, Jenifer Ehreth, Alice McClellan Vickie L. Waldron

Special Problems - Tablet die mark comparison, Illicit Laboratories

*(1) Drug Enforcement Administration (415) 556-0951
San Francisco Regional Lab
Post Office Box 36075
San Francisco, CA 94102

ENVIRONMENTAL PROBLEMS

Air & Water Quality: General

*(2) Investigation-Administer, Environmental 449-3946
Sciences Division
Laboratory - Walter Jankowski 449-3644
Dept Health & Environmental Sciences.

Gasoline leakage - (for Environmental Protection Agency (EPA) Labs contact Jankowski (above)

CIL *(1) Arnold Melnikoff, Larry Pederson.

Hydrology

*(3) Max Botz 442-0950
Westech, Inc.
Colonial Inn
Helena, Montana 59601

Plant Pathology

(2) U of M Botany Dept. 243-2671
Dr. Clancy Gordon

(2) MSU Biology Dept. 994-4821
Dr. Frank Munshwoer

Sewage & Sanitation Engineering

(2) MSU Civil Engineering Dept. 994-2111
Dr. Robert Sanks

Trace Metal Analyses

(?) U of M Chemistry Dept. 243-2692
Dr. Wayne P. VanMeter

Pesticide Analyses (for EPA Lab, call Jankowski, Dept. Health)

*(2) Thomas A. Bishop, Pesticide Division 449-3730
Department of Agriculture
1300 Cendar St.
Airport Way - Building West
Helena, Montana 59601

*(2) Laszlo Torma, Analytical Lab 994-3303
Chemistry Station
McCall Hall, M.S.U.
Bozeman, Montana 59717

EXPLOSIVES - (see ATF)

CIL *(1) Arnold Melnikoff (some types)

(?) U of M.Chemistry Dept. 243-2692
Dr. Forrest D. Thomas

(?) Edward J. Keller 243-4201

On Nature & Effects

*(3) Donald McDonald, Tech. Rep. (415) 341-5891
Atlas Powder Company
Western Regional Office
Post Office Box 5075
San Mateo, CA 94402

FINGERPRINTS

*(1) Philip W. Conover, Chief 449-?800
Identification Bureau
1437 Helena Avenue
Helena, Montana 59601

FIREARMS & TOOL-MARK EXAMINATIONS - (see BI or ATF)

CIL *(1) Larry A. Pederson (muzzle to garment distances only)

(?) Dr. James L. Booker, Director (307) 777-7607
Wyoming State Crime Lab
591 Hathaway Building
Cheyenne, Wyo. 82002

FISH & GAME VIOLATIONS - Species identification of blood & hair (Some at CIL - See forensic serology & hair & fiber comaprison sections)

*(1) Ken Greer & Dan Palmisiciano 994-3285
Montana Fish & Game Research Station
Research Park Building
Montana State University
Bozeman, Montana 59715

FORENSIC ANTHROPOLOGY

(2) U of M Anthropology Dept. 243-2693
Rob Pierson, Grad. Student Specialist

Dr. Charline Smith 243-5930

Special problems to
(2) Osteology Lab
The Smithsonian Institute
Washington, D. C. 20560

Indian Artifacts

(2) Anthropology Processing Lab
Museum of Natural History
Room 311
Washington, D. C. 20560

FORENSIC GEOLOGY

(2) U of M Geology Deptartment 243-4851
Dr. John P. Wehrenburg
Dr. Raymond Murray

FORENSIC PATHOLOGY - Over 30 pathologist do autopsies in Montana, the following have expressed a special interest in this area.

*(3) Dr. John P. Pfaff - (only board certified forensic pathologist in Montana)

*(3) Dr. John Henneford 453-3231
Columbus Hospital
Great Falls, Montana 59401

*(3) Dr. Donald Schaffer (board eligible) 265-2211
Northern Montana Hospital
Havre, Montana 59501

*(3) Dr. J. A. Newman (Member American Academy Forensic Science)
St. James Hospt.
Butte,
Montana 59701
792-8361

*(3) Dr. B. J. McLavery
&
Dr. Tom Moylan
Missoula General Hospt.
Missoula, Montana 59801
542-2191

Names, addresses & phone numbers of others available on request from CIL.

FORENSIC SEROLOGY - (See FBI,ATF - Also fish & Game violations)

CIL *(1) Ken Konzak

FORENSIC TOXICOLOGY - including blood alcohol (see Forensic Pathologists)

CIL *(1) Jim Hutchison & Jenifer Ehreth

Special Problems

(3) Dr. Brian Finkle
Center for Human Toxicology
Skaggs Hall - University of Utah
Salt Lake City, Utah 84112
(801) 581-5117

HAIR & FIBER COMPARISON - (See FBI,ATF) (see also Fish & Game violations)

CIL *(1) Arnold Melnikoff

MATERIALS TESTING - (See FBI,ATF) (contact manufacturer i.e. auto door failure, contact dealer's mechanic)

Wood Products

(3) Dr. T. M. Maloney, Wood Technology
Department of Material Science & Engineering
Washington State University

Variety of experts in materials science (ceramics, energy transmission & metal processing, available at:

(3) Montana Energy & MHD Research and Development Institute
P. O. Box 3809
Butte, Montana 59701
Call Dr. J. Rasmussen
Applied Research Division
494-4561 (Ext. 235)

POLYGRAPH OPERATORS - Most working for S.O or P.D., will work for other law enforcement agencies.

	Billings PD	
*(3)(2)	Jerri Wamsley	248-3181
*(?)	George Bell	248-3181
	Cascade Co. S.O.	
*(?)	Arnie Sands	453-0242
*(?)	Jim Burns	453-0242
	Columbia Falls	
*(3)	Dick Walsh	892-3256
	Gallatin Co. S.O.	
*(?)	John Onstad	586-?315
	Glendive PD	
*(?)	Duane Peterson	365-2212
	Great Falls PD	
*(?)	Jim Cook	727-5881
	Helena	
*(3)	Gary Yonkers	443-6477
	Kalispell PD	
*(?)	Dick Stotts	755-?122
	Lewis & Clark Co. S.O	
*(?)	Reginald Norburg	442-7880
	Missoula County S.O	
*(?)	Wendell Frojen	721-1470
	Spokane Washington	
*(3)	Royce Thronburg	(509) 838-5203
*(3)	Ron Laws	

POISONOUS ANIMALS - (also see veterinarians)

(3) Dr. Herbert L. Stahnke, Director
Poisonous Animals Research Lab
Arizona State University
Tempe, Arizona 95281

SERIAL NUMBER RESTORATION - (See FBI,ATF)

CIL *(1) Arnold Melnikoff

With listed Insurance companies - Auto & motorcycle only

*(1) National Auto Theft Bureau (415) 863-2404
Pacific Coast Division
100 Bryant Street
San Francisco, CA 94103

TAPE IDENTIFICATION - (see FBI, ATF & CIL for some cases)

Special Problems

(3) C. E. Twitchell
3-M Tape Laboratory 230-BC8
3-M Center
St. Paul, Minnesota 55101

TRACE EVIDENCE - (see FBI, ATF)

CIL *(1) Arnold Melnikoff & Larry Pederson

Trace elements by X-ray fluorescence

(2) Mike Howard
Oregon State Crimbe Lab
222 So. W. Pine St.
Portland, Oregon 97204

VETERINARY SCIENCE

*(2) Dr. Quinn 994-4885
State Veterinary Diagnostic Lab
Montana State University
Bozeman, Montana 59717